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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JAMES ROBERT HUGHES, Appellant.	2 CA-CR 2009-0004 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074004

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED

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K E L L Y, Judge.

¶1 After a jury trial, appellant James Robert Hughes was convicted of four counts of sexual conduct with a minor and one count of child abuse. The trial court

imposed a combination of consecutive and concurrent, presumptive sentences totaling 12.5 years' imprisonment and ordered Hughes to register as a sex offender. On appeal he claims the court abused its discretion in admitting evidence that he had sexually abused the victim during the years preceding the charged offenses. Finding no error, we affirm.

Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). Hughes moved to Tucson with his family, including his sixteen-year-old daughter, A., in 2003. In Tucson, Hughes continued his sexual abuse of A., which had started when A. was twelve and the family lived in Texas. This continued abuse included touching A.'s breasts and vagina, oral sex, and sexual intercourse. As A. testified at trial, "whenever he wanted me, he came and he got what he wanted. It's usually sex, intercourse." Ultimately, this resulted in a pregnancy, which both A.'s mother and Hughes knew about. Hughes gave A. medication obtained in Mexico that caused A., after rough intercourse with Hughes and severe cramping, to expel a fetus, which Hughes then buried.

¶3 When A. turned eighteen, she moved out of the house and later reported the abuse to the police. The state charged Hughes with four counts of sexual conduct with a minor, two counts of sexual abuse, and one count of child abuse under circumstances likely to cause death or serious physical injury, all for acts alleged to have occurred in Arizona. The trial court directed a judgment of acquittal on the two counts of sexual abuse, and the jury found Hughes guilty of four counts of sexual conduct with a minor

and one count of child abuse. Following imposition of sentence, as set forth above, this appeal followed.

Discussion

¶4 In the sole issue raised on appeal, Hughes argues the trial court abused its discretion in admitting evidence under Rule 404(c), Ariz. R. Evid., that he had also sexually abused A. before the charged offenses occurred. He maintains this evidence was unfairly prejudicial. We review the trial court's admission of evidence under Rule 404(c) for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004).

¶5 Before trial, the state filed a notice of intent to introduce evidence of other acts pursuant to Rules 402 and 404(b) and (c), Ariz. R. Evid. The evidence concerned Hughes's abuse of A. and the removal of children from his home between 1989 and 1992 and his sexual abuse of A. in different cities and states between 1996 and 2003. Hughes responded to the notice, arguing the evidence should be precluded because it was irrelevant, highly prejudicial, and not permitted under Rules 402 and 404(b) and (c).

¶6 The trial court ruled the state could introduce evidence of Hughes's sexual abuse of A. in other cities and states when she was between twelve and sixteen years old, but precluded evidence of abuse and removal between 1989 and 1992. The court ruled that the sexual abuse evidence tended to show a propensity on Hughes's part to engage in the charged offenses. It found that the uncharged conduct was relatively recent in time and similar to the charged conduct; that A.'s testimony, with anticipated corroboration by her mother and brother, was sufficient to allow the jury to find by clear and convincing

evidence that the acts had occurred; and that the probative value of the evidence substantially outweighed the danger of unfair prejudice to Hughes.

¶7 At trial, A. testified her parents were missionaries and the family had "traveled a lot" and described the following incidents of sexual abuse that had taken place before the family moved to Tucson in 2003. While A. was staying in a Texas motel with her family at age twelve, Hughes had started touching her and kissing her on the lips. Soon after, when she was still twelve, Hughes had her put lotion on his legs and perform oral sex on him. Later, while they lived in California in 2001, Hughes had removed A.'s clothing and had sexual intercourse with her after touching her breasts, legs, and vagina. He told her "he had stuck his penis in [her]," "we're going to do this again," and "God had told him to do this, to train [her] in this way to be a good woman when [she] grew up." The abuse happened "[e]very day after that." At one point before A. was sixteen, Hughes lived in Mexico with A. and her brother while A.'s mother worked in Tucson for three months. During this period, A. moved into Hughes's bedroom, "became his official wife," and had daily intercourse with Hughes.

¶8 A. also testified about similar incidents in Texas, Colorado, and Mexico, which she said both her mother and brother had observed. Although A.'s mother denied having witnessed any of those incidents, she had seen Hughes and A. embracing in a river while the family was bathing. When her mother appeared, A. had suddenly ducked underwater. A.'s mother testified that she had had suspicions of something inappropriate between Hughes and A., but both had denied it to her when asked.

¶9 A.'s brother C. testified about various incidents of Hughes's abuse of A. When the family lived in Texas, he saw Hughes kiss A. and rub her vaginal area. In Colorado, he saw Hughes and A. engaging in oral sex. In Mexico, he heard "moaning, groaning and banging on the wall from a cot inside" where Hughes and A. were located, and he confronted Hughes about what he was doing to A. Hughes told C. that God had told him to do it, and he sent C. "up on the mountain [to] pray" and to "get [his] heart right." C. did not report the abuse.

¶10 Initially, we note the trial court admitted this evidence under both Rule 404(b) and Rule 404(c). On appeal, however, Hughes challenges its admission only under Rule 404(c). We could dispose of this matter solely on that basis. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim."). In any event, we find no abuse of discretion in the trial court's ruling this propensity evidence admissible under Rule 404(c).

¶11 Pursuant to Rule 404(b), "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id*. But under Rule 404(c), when "a defendant is charged with having committed a sexual offense . . . evidence of other crimes, wrongs, or acts may be

admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged."

¶12 For such evidence to be admitted, however, the trial court must make several specific findings:

> (A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.
>
> (B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.
>
> (C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403[, Ariz. R. Evid.]. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:
>
> (i) remoteness of the other act;
>
> (ii) similarity or dissimilarity of the other act;
>
> (iii) the strength of the evidence that defendant committed the other act;
>
> (iv) frequency of the other acts;
>
> (v) surrounding circumstances;
>
> (vi) relevant intervening events;
>
> (vii) other similarities or differences;
>
> (viii) other relevant factors.

Ariz. R. Evid. 404(c)(1). When propensity evidence is admitted at trial, the trial court must "instruct the jury as to the proper use of such evidence." Ariz. R. Evid. 404(c)(2). The trial court here made specific findings and instructed the jury as required.

¶13 Hughes challenges only the trial court's finding with respect to Rule 404(c)(1)(C). He maintains the court abused its discretion in ruling that the probative value of the evidence outweighed any danger of unfair prejudice resulting from its admission. According to Hughes, the state had less need for the propensity evidence because it "presented other corroborative-type evidence" to support A.'s testimony. But Hughes has cited no authority to support the proposition that a trial court abuses its discretion in admitting propensity evidence merely because the state has presented corroborating evidence of the charged acts. Ariz. R. Crim. P. 31.13(c)(1)(vi).

¶14 Here the trial court properly weighed the factors enumerated in Rule 404(c)(1)(C). Hughes does not specifically dispute the court's findings on the recency of the other acts, their similarity to the charged offenses, or the strength of the evidence that the other acts were in fact committed. We cannot say the court abused its discretion in admitting the evidence in the absence of "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ariz. R. Evid. 403.

¶15 Hughes contends the purpose of allowing propensity evidence was not met here, citing *State v. McFarlin*, 110 Ariz. 225, 517 P.2d 87 (1973). He relies on *McFarlin* to argue that "the purpose of allowing the exception to the ordinary presumption against allowing character evidence was in order to assist the trier of fact in those situations in

which the victim is a child." Because A. was sixteen and seventeen years old when the charged events took place, Hughes claims that purpose was not met in this case.

¶16 First, we note that A. was nonetheless a minor when these crimes occurred, and Hughes was charged with sexual conduct with a minor. Additionally, as our supreme court explained in *State v. Aguilar*, 209 Ariz. 40, ¶ 24, 97 P.3d 865, 872 (2004), "with the adoption of Rule 404(c), the types of sex offenses for which other act evidence may be admitted are no longer restricted to those offenses listed in *McFarlin*." Thus, whatever the initial reasons for the exception allowing other act evidence demonstrating an aberrant sexual propensity, the exception now applies to all cases involving sexual offenses. Ariz. R. Evid. 404(c).

¶17 Hughes asserts the trial court should have "made [an] effort to 'narrow' the testimony of the prior bad acts." He does not, however, explain what evidence the court should have excluded or how it should have narrowed the evidence to lessen its prejudicial effect, and we conclude the court did not abuse its discretion in admitting the evidence in its entirety.

¶18 Quoting *State v. Mills*, 196 Ariz. 269, ¶ 28, 995 P.2d 705, 711 (App. 1999), Hughes further argues "the evidence was unfairly prejudicial because it had 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" We acknowledge the evidence here was prejudicial. But, like the *Mills* court, we cannot say it was unduly so or that it "suggest[ed] a decision on an improper basis." *Id.* Rather, it was properly admitted evidence of an "aberrant sexual propensity to commit the crime charged." Ariz. R. Evid. 404(c); *see Mills*, 196 Ariz. 269, ¶ 28, 995

P.2d at 711. Thus, the trial court did not abuse its discretion in admitting evidence of Hughes's abuse of A. in the years preceding the charged offenses.

Disposition

¶19 Hughes's convictions and sentences are affirmed.

VIRGINIA C. KELLY, Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

PHILIP G. ESPINOSA, Presiding Judge